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EDITOR'S NOTE

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(SHOW) PROCEEDINGS AND ORDERS DATE: 061687

CASE NBR 86-1-01289 CSY
SHORT TITLE California DOCKETED: Jan 23 1987
VERSUS Sabo, Ronald L., et al.

Date	Proceedings and Orders
Jan 23 1987	Petition for writ of certiorari filed.
Mar 18 1987	DISTRIBUTED. April 3, 1987
Mar 30 1987	Motion of respondent for leave to proceed in forma pauperis filed.
Mar 23 1987	Motion of respondents for leave to proceed in forma pauperis filed.
Apr 1 1987	Response requested. (Due April 17, 1987 - NONE RECEIVED)
Apr 15 1987	REDISTRIBUTED. May 1, 1987
Apr 15 1987	Brief of respondents Ronald Sabo and Angela Zizzo in opposition filed.
May 5 1987	REDISTRIBUTED. May 14, 1987
May 18 1987	Motion of respondents for leave to proceed in forma pauperis GRANTED.
May 18 1987	Petition DENIED. Dissenting opinion by Justice White with whom The Chief Justice joins. (Detached opinion.)

CONTINUE (PROCEEDINGS AND ORDERS DATE: 061687

CASE NBR 86-1-01289 CSY
SHORT TITLE California DOCKETED: Jan 23 1987
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PETITION FOR WRIT OF CERTIORARI

No. 86-1289

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

RONALD LEE SABO and ANGELA MARIE ZIZZO,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOURTH APPELLATE DISTRICT, DIVISION ONE

EDWIN L. MILLER, JR.
District Attorney of
the County of San Diego,
State of California
PETER C. LEHMAN
Deputy District Attorney
LES W. DUBOW
Deputy District Attorney
101 West Broadway, Suite 700
San Diego, California 92101
Telephone: (619) 579-3622
Attorneys for Petitioner

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

45 pp

QUESTIONS PRESENTED

1. Whether ground observations from a helicopter at an altitude of 400 feet over residential backyards violate reasonable expectations of privacy within the meaning of the Fourth Amendment?

2. Whether the Fourth Amendment distinguishes the concepts of "lawful flight" and "navigable airspace?"

3. Whether the supremacy clause mandates the following of *Texas v. Brown* (1983) 460 U.S. 730 [75 L.Ed.2d 502, 103 S.Ct. 1535] in California?

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No. _____

IN THE

Supreme Court of the United States

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THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

RONALD LEE SABO and ANGELA MARIE ZIZZO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOURTH APPELLATE DISTRICT, DIVISION ONE

Petitioner, The People of the State of California, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, affirming the judgment of the Superior Court, in and for the County of San Diego, suppressing evidence and dismissing the case, entered on September 19, 1986. A petition for review in the Supreme Court of the State of California was denied on November 26, 1986. The remittitur was issued on December 4, 1986.

OPINIONS BELOW

The published opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, affirming the suppression of evidence and dismissal of case (*People v. Sabo* (1986) 185 Cal.App.3d 845) appears as Appendix A of this petition. A copy of the California Supreme Court's order denying the petition for review appears as Appendix B of this petition.

JURISDICTION

The judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division One, was filed on September 19, 1986. A timely petition for review was denied by the California Supreme Court on November 26, 1986. This petition is filed within 60 days of that date and, therrefore, timely. This Court's jurisdiction is invoked under 28 United States Code section 1257(3).

CONSTITUTIONAL AND STATUTORY PROBLEMS INVOLVED

United States Constitution, Amendments Four and Fourteen, and article VI, section two.

STATEMENT OF THE CASE

On October 24, 1984, the respondents were arraigned in the Municipal Court of California, County of San Diego, El Cajon Judicial District, for alleged violations of California Health and Safety Code sections 11350(a), 11351, 11358, and 11359.

On November 26, 1984, a preliminary hearing was held in the El Cajon Municipal Court and both respondents were held to answer on all charges in the San Diego County Superior Court.

On December 12, 1984, both respondents were arraigned in the San Diego County Superior Court for alleged violations of California Health and Safety Code sections 11350(a), 11351, 11358, and 11359. Also on December 12, 1984, both respondents filed a motion to suppress evidence pursuant to California Penal Code section 1538.5 scheduled for hearing on January 15, 1985, at 3:45 p.m., in Department 27 of the San Diego County Superior Court, the Honorable William T. Low, presiding.

On January 15, 1985, the motion to suppress evidence as to respondent Zizzo was heard by Judge Low. Respondent Sabo did not appear and his motion to suppress evidence was taken off calendar. On January 16, 1985, Judge Low, in an ex parte order, granted respondent Zizzo's motion to suppress.

On January 22, 1985, the Honorable Daniel J. Kremer permitted respondent Sabo to join in the motion to suppress evidence and then granted respondents' motion to dismiss the case.

On March 8, 1985, petitioner filed a notice of appeal pursuant to California Penal Code section 1238(a)(7).

On October 24, 1985, petitioner filed his opening brief.

On July 1, 1986, the Court of Appeal of the State of California, Fourth Appellate District, Division One, vacated its submission of the case and requested further briefing by all parties in light of the

United States Supreme Court holding in *California v. Ciraolo* (1986) 476 U.S. _____ [90 L.Ed.2d 210, 106 S.Ct. 1809].

On September 19, 1986, the California Court of Appeal issued its published opinion, a copy of which is attached as an appendix.

On November 26, 1986, the petition for review was denied by the California Supreme Court. The remittitur was filed on December 4, 1986.

STATEMENT OF FACTS

The Following facts are taken from the affidavit for search warrant made part of the record on appeal.

On August 28, 1984, Agent Larry Martin of the Narcotics Task Force contacted Deputy Wilson, a helicopter pilot with the San Diego County Sheriff's Astrea Unit. Deputy Wilson explained that while flying a recent routine patrol mission in a Sheriff's Department helicopter, he observed what he believed to be marijuana plants. Deputy Wilson observed the plants growing inside a greenhouse-type structure located on El Capitan Drive, La Mesa, California. At the time of this observation several of the top panels were not in place, thus allowing Deputy Wilson to have an unrestricted view of the marijuana plants.

On August 28, 1984, Agent Martin directed Deputy Wilson to fly him over the above-mentioned area. At 12:35 p.m., at an altitude of approximately 400 feet, while looking from the cockpit of the helicopter, Agent Martin observed a greenhouse approximately 15 by 20 feet located in the backyard directly west of the residence. The greenhouse had several panels missing from the side and roof giving Agent Martin an unrestricted view of numerous marijuana plants growing inside the structure. The helicopter circled over the greenhouse and Agent Martin's view was not enhanced by use of binoculars or a telescope. (Reporter's Transcript, hereinafter referred to as "R.T.," pp. 32-36.)

On August 29, 1984, a search warrant was issued and executed at 7974 El Capitan Drive, La Mesa, California, the location of the above-mentioned greenhouse. (R.T. p. 3.) The search of the residence and greenhouse led to the seizure of controlled substances.

HOW THE FEDERAL QUESTION IS PRESENTED

The California Court of Appeal affirmed the judgment of the Superior Court of the State of California, in and for the County of San Diego, suppressing the evidence and dismissing the case based upon its determination that aerial surveillance of ground-based activities from a helicopter at an altitude of 400 feet violated the Fourth Amendment.

The Court of Appeal distinguished this Court's holdings in *California v. Ciraolo*, *supra*, validating a search based on fixed-wing aircraft observations from an altitude of 1,000 feet finding aerial observations from an altitude defined in 14 Code of Federal Regulations section 91.79(b) and (c) requires a traditional approach to appellate review.

Further, the California Court of Appeal held that notwithstanding the lawful operation of the helicopter at an altitude of 400 feet, it was not within navigable airspace as defined in 49 United States Code sections 1301(29) and 1304.

The California Court of Appeal reasoned aerial surveillance of ground-based activities from an aircraft not in navigable airspace violates the Fourth Amendment requiring exclusion of the evidence and dismissal of the case.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

The California Court of Appeal decision that aerial surveillance from an altitude of 400 feet violates the Fourth Amendment of the

federal Constitution is erroneous and it violates the supremacy clause of the federal Constitution. The decision fails to recognize that this Court has determined that observations by law enforcement from a place they have a lawful right to be in does not offend fundamental notions inherent in the evolution of Fourth Amendment protections.

Further, the practical effect of allowing the decision of the Court of Appeal to stand creates a double standard for the use of helicopters by law enforcement. On one hand, because of the unique capabilities to gambol the sky, citizens rely on them to save lives by rescuing flood victims while hovering above their floating homes, or rescuing mountain climbers, or searching for lost children. Yet, these capabilities may not be used in the apprehension of criminals or the discovery of criminal conduct.

Further, the scope of permissible conduct by law enforcement as it relates to aerial surveillance by helicopters is in a state of flux throughout the United States and particularly in California. Injunctive relief was granted by the United States District Court for the Northern District of California prohibiting aerial surveillance by DEA agents from helicopters below 500 feet. This order is attached as Appendix C.

In another northern California county helicopters may fly above an individual in a rural area at 150 feet.

Thus, certiorari should be granted to define the proper limitations of helicopter aerial surveillance of ground-based activities in light of this Court's holding in *California v. Ciraolo, supra.*

ARGUMENT

I

GROUND OBSERVATIONS FROM A HELICOPTER AT AN ALTITUDE OF 400 FEET OVER RESIDENTIAL BACKYARDS DO NOT VIOLATE REASONABLE EXPECTATIONS OF PRIVACY WITHIN THE MEANING OF THE FOURTH AMENDMENT.

While petitioner concedes respondents' use of a greenhouse for their illegal argricultural pursuits is persuasive of a subjective expectation of privacy, petitioner contends the subjective expectation of privacy is unreasonable within the meaning of *Katz v. United States* (1967) 389 U.S. 347 [19 L.Ed.2d 599, 88 S.Ct. 507]. Petitioner further contends respondents have no reasonable expectation of privacy from a helicopter circling their property at an altitude of 400 feet.

As the Court of Appeal noted:

> "*Ciraolo* reaffirms the standard of Fourth Amendment analysis set forth in *Katz v. United States* (1967) 399 U.S. 347: 'The touchtone of Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy." *Katz v. United States*, 389 US 347, 360 . . . (1967) (Harlan J., concurring). Katz posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable? [Citation.]' (*Ciraolo, supra,* at p. 215.)" (*People v. Sabo, supra,* at p. 848.)

In *People v. Superior Court [Stroud]* (1974) 37 Cal.App.3d 836, helicopter flights over residential backyards at an altitude of 500 feet in search of stolen auto parts was held not to be a search within the meaning of the Fourth Amendment. (*Id.*, at p. 839.) So,

too, in *People v. Messervy* (1985) 175 Cal.App.3d 243, the Second District Court of Appeal held that a helicopter flying over an *open field* at an altitude of *150* feet did not violate Fourth Amendment protections. (*Id.*, at p. 248.) Further, in *Messervy*, the officer's observations of defendant quickly loading items into a car near the marijuana plants and driving away evading police not only failed to offend Fourth Amendment proscriptions, the observation "deepened into problable cause." (*Id.*, at p. 248.)

Thus, petitioner contends the authority of *Stroud* and *Messervy* sanctions helicopter overflights at 500 feet and 150 feet respectively. Indeed, the *Messervy* court opined:

> "It is true that in *Sneed*, the observation from a helicopter flying at a height of approximately 20-25 feet of a single marijuana plant growing in a ranch corral was held to be unreasonable. The court recognized that there would be no objective, reasonable expectation of privacy from aerial observation from a *reasonable* height." (Emphasis added; *People v. Messervy, Supra,* at p. 246.)

Thus, it is clear the controlling factor here is: What is a reasonable height? In *People v. Joubert* (1981) 118 Cal.App.3d 637, a fixed-wing aircraft flying at an altitude of 500 feet and circling the periphery of defendant's 19-acre rural residential parcel approximately 15 to 25 times without flying directly over it was held not to be a search within the purview of the Fourth Amendment. (*People v. Joubert, supra,* at p. 648.) So, too, in *Dean v. Superior Court* (1973) 35 Cal.App.3d 112, a fixed-wing aircraft making three passes over defendant's rural three-fourth's acre parcel at altitudes of 700 feet, 400 to 500 feet, and 300 feet, respectively, and revealing cultivated 15- to 20-foot marijuana plants did not violate the Fourth Amendment. (*Dean v. Superior Court, supra,* at p. 118.)

Petitioner contends the Court of Appeal in the instant case erred in determining ground observations from a helicopter at an altitude of 400 feet is unreasonable within the meaning of the Fourth Amendment.

The California Court of Appeal decision is in noncompliance with this Court's articulation of "bright line" rules in the area of Fourth Amendment doctrine.

In *California v. Ciraolo, supra,* this Court held an aerial surveillance by a fixed-wing aircraft at an altitude of 1,000 feet in navigable airspace did not constitute a search within the meaning of the Fourth Amendment. In *Michigan v. Summers* (1981) 452 U.S. 692 [69 L.Ed.2d 340, 101 S.Ct. 2587], this Court stated:

> "[I]f police are to have workable rules, the balancing of interests . . . must in large part be done on a categorical basis — not in an ad hoc, case-by-case fashion by individual police officers." (*Id.*, at p. 705, n. 19.)

Further, in *New York v. Belton* (1981) 453 U.S. 454 this Court observed,

> "Fourth Amendment protections can only be realized if the police are acting under a set of rules which, in most instances, make it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.' " (*Id.*, at p. 458, quoting LaFave, "Case by Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 S.Ct.Rev. 127, 142.) "This is because 'Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are

> necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts, and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be literally impossible of application by the literally impossible of application by the officer in the field.' " (*Id.*, at p. 458, citing LaFave, "Case-By-Case Adjudication" Versus "Standardized Procedures," *supra*, at p. 141.)

The California Court of Appeal decision departs from the pronouncement of Fourth Amendment doctrine by creating on the part of law enforcement a guessing game as to which law enforcement activity will be sanctioned in state court.

The California Court of Appeal recognized that its decision was contrary to the development of sound Fourth Amendment doctrine:

> "We conclude *Ciraolo* does not declare a rule to govern aerial surveillance of the curtilage in all circumstances and at any altitude and from any platform. We come reluctantly to this conclusion because of the obvious difficulties it creates. We concede that consideration of aerial surveillance by helicopter outside navigable airspace will again invoke myriad factual variations on the theme and require a case-by-case analysis to determine whether the surveillance offends Fourth Amendment precepts. Also, our conclusion creates a two-tiered concept. *Ciraolo-Dow* governs aerial surveillance conducted within and from navigable airspace. Such surveillance outside navigable airspace continues to call for traditional inquiry into reasonable privacy expectation." (*People v. Sabo, supra,* at p. 854.)

The Court of Appeal readily conceded that helicopters may lawfully be operated at less than the minimum altitudes applicable to aircraft if the operation is conducted "without hazard to persons or property on the surface." (*People v. Sabo, supra,* at p. 852, quoting 14 C.F.R. 91.79(d) (1986).) Petitioner, therefore, contends that the California Court of Appeal was in error when it, nevertheless, concluded that the lawful operation of the helicopter did not equate with "navigable airspace" to authorize the aerial surveillance approved in *California v. Ciraolo, supra.* (*People v. Sabo, supra,* at p. 852.) This Court's bright line rule-making policy, Fourth Amendment scholarship, and the rationale underlying the promulgation of bright line rules, clearly support this contention.

II

THE FOURTH AMENDMENT DOES NOT DISTINGUISH THE CONCEPTS OF "LAWFUL FLIGHT" AND "NAVIGABLE AIRSPACE."

Petitioner contends that "lawful flight" and "navigable airspace" are synonymous in terms of the Fourth Amendment. In *California v. Ciraolo, supra,* the observations were made "from an aircraft lawfully operating at an altitude of 1,000 feet." (*Id.*, at p. 218.) In the instant case, the California Court of Appeal held that notwithstanding the legality of the helicopter flight in the instant case, flight at 400 feet is not within navigable airspace and therefore does not fall within the provisions of *California v. Ciraolo, supra,* and *Dow Chemical v. United States* (1986) 476 U.S. _____ [90 L.Ed.2d 226, 106 S.Ct. 1819].

Petitioner contends this holding is erroneous. Accepting this premise would prohibit observations made from aircraft taking off or landing since by analogy all aircraft must sooner or later land; under the court's reasoning such aircraft would not be in navigable airspace.

However, navigable airspace is defined in 49 United States Code section 1301(29), to wit:

"(29) 'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft."

In 14 Code of Federal Regulations section 91.79 the minimum altitudes for flight in navigable airspace are defined as:

"§ 91.79 **Minimum safe altitude; general.**

"Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

"(a) *Anywhere.* An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

"(b) *Over congested areas.* Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

"(c) *Over other than congested areas.* An altitude of 500 feet above the surface except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

"(d) *Helicopters.* Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section if the operation is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with routes or altitudes specifically prescribed for helicopters by the administrator."

Thus, nevigable airspace under the regulations is anywhere that would not constitute undue hazard to persons or property on the surface. (14 C.F.R., § 91.79(a) and (c).)

Petitioner contends pursuant to the definition of navigable airspace and the Code of Federal Regulations governing navigable airspace, a helicopter flying at an altitude of 400 feet is in lawful flight within navigable airspace.

Indeed, as indicated *supra* in terms of the Fourth Amendment, a helicopter flying 150 feet above suspects who were loading a vehicle adjacent to a marijuana field did not offend fundamental notions inherent in the Fourth Amendment, the observations "deepened into probable cause." (*People v. Masservy, supra,* at p. 248.)

III

THE SUPREMACY CLAUSE (U.S. CONST., ART. VI, §2) MANDATES THE FOLLOWING OF *TEXAS v. BROWN, SUPRA,* IN CALIFORNIA.

Lastly, petitioner contends this Court's holding in *Texas v. Brown, supra,* governs the legality of the observations herein and is binding upon all courts in the land pursuant to the federal Constitution, article VI, section 2. Further, this holding is binding in California pursuant to the California Supreme Court's holding in *In re Lance W.* (1985) 37 Cal.3d 873.

Thus, assuming the helicopter in the instant case was not flying in navigable airspace, the California Court of Appeal's holding the aircraft was in lawful flight indicates any observations made while in lawful flight cannot offend Fourth Amendment protections.

In *Texas v. Brown, supra,* this Court held that a police officer's observations of the inside of a vehicle he had stopped at a license checkpoint, from his vantage point outside the vehicle, was not a search within the meaning of the Fourth Amendment. This Court stated:

> "There is no reason that [the police officer] should be precluded from observing as an officer what would be entirely visible to him as a private citizen. There is no legitimate expectation of privacy shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent officers. The conduct (changing position and bending down) that enabled the police officer to observe the interior of the defendant's car and his glove compartment was not a search within the meaning of the Fourth Amendment." (*Texas v. Brown, supra*, 460 U.S. at p. 740.)

In *California v. Ciraolo, supra,* when this Court validated the aerial surveillance, it similarly found it determinative that the observations of the officers took place from a public vantage point — navigable airspace:

> "The mere fact that an individual has taken measures to restrict some views of his activities does not preclude police officers' observations from the *public vantage point* where he has a right to be. [Emphasis added.] "...
> "Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. [We] readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor." (*California v. Ciraolo, supra,* at pp. 216-217.)

Thus, the critical issue is whether the observations are made from a public vantage point where the officer has a right to be. The California Court of Appeal, by holding the flight was legal, albeit not within navigable airspace, was erroneous in not applying the dictates of *Texas v. Brown, supra,* mandated by the California

Supreme Court's holding in *In re Lance W.* (1983) 37 Cal.3d 873, and the supremacy clause of the federal Constitution, article VI, section 2.

CONCLUSION

For the fundamental reasons expressed herein, petitioner respectfully requests this Court grant certiorari.

Dated: JAN 23 1987

Respectfully submitted,

EDWIN L. MILLER, JR.
District Attorney of
the County of San Diego,
State of California
PETER C. LEHMAN
Deputy District Attorney

By:
LES W. DUBOW
Deputy District Attorney

Attorneys for Petitioner

APPENDICES

APPENDIX A

California Court of Appeal Opinion
Dated September 19, 1986

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,	)	
	)	
Plaintiff and Appellant,	)	
	)	
v.	)	D002860
	)	
RONALD LEE SABO et al.,	)	(Super. Ct. No. CR 71482)
	)	
Defendant and Respondent.	)	
_____	)	

APPEAL from orders of the Superior Court of San Diego County, William T. Low and Daniel J. Kremer, Judges. Affirmed.

Edwin L. Miller, Jr., District Attorney, Peter C. Lehman, Les W. Dubow, D. Michael Ebert and Anthony Lovett, Deputy District Attorneys, for Plaintiff and Appellant.

Robert F. Gusky and Christopher Blake, under appointments by the Court of Appeal, for Defendants and Respondents.

The People appeal an order dismissing criminal proceedings against Ronald Lee Sabo and Angela Marie Zizzo (respondents) after the court sustained their motions to suppress evidence seized in a search authorized by a warrant issued following a helicopter flight observation of marijuana growing in a backyard greenhouse. Distinguishing *California v. Ciraolo* (1986) 476 U.S. _____ [90 L.Ed.2d 210, 106 S.Ct. 1809], validating a search based on fixed wing aircraft observations from an altitude of 1,000 feet of marijuana in plain view growing in a backyard, we affirm.

I

Sabo and Zizzo lived together in a residence on El Capitan Drive in La Mesa, California. During a routine helicopter patrol mission, Deputy Sheriff Wilson observed what he believed to be marijuana plants growing inside a 15 by 20 foot greenhouse located in the backyard, directly west of respondents' house. Deputy Larry Martin of the narcotics squad then joined Wilson in the helicopter.

Hovering at 400-500 feet, Martin saw the greenhouse. Several roof and side panels were missing. A tall pine tree and heavy vegetation inhabited a direct view into the structure. However, as Wilson circled the helicopter, Martin was able to see marijuana plants growing inside the greenhouse.

Based on Martin's information, a search warrant issued and sheriff's deputies found marijuana in the greenhouse. The court granted respondents' motion to suppress the seized marijuana, holding the aerial surveillance violated their Fourth Amendment rights, and dismissed the action.

II

At the suppression hearing, the People argued the motion should be denied because aerial overflights and ovservations do not violate a person's legitimate privacy expectation, Deputies Martin and Wilson were in a public place open to their use at the time of the search, respondents' curtilage is not a protected area, and respondents' expectation the police would not see the marijuana growing in their greenhouse in unreasonable. The court granted the motion, finding: "The area searched (greenhouse) was within the defendant's curtilage. A reasonable expectation of privacy existed. A warrantless overflight consituted an unreasonable search in violation of the Fourth Amendment. The fruits of that unconstitutional search cannot support a warrant."

The court's finding was based on *People v. Ciraolo* (1984) 161 Cal.App.3d 1081, to the effect a warrantless aerial surveillance of

residences and curtilages wherein a defendant could reasonably entertain an expectation of privacy violated the Fourth Amendment. (See *People v. Cook* (1985) 41 Cal.3d 373.)

Following oral argument on this appeal, the Supreme Court issued its opinion May 19, 1986, in *California v. Ciraolo, supra,* 476 U.S. _____ [90 L.Ed.2d 210, 106 S.Ct. 1809] (hereafter *Ciraolo*), reversing *People v. Ciraolo, supra,* 161 Cal.App.3d 1081. We asked the parties to submit additional briefs on the impact of *Ciraolo* here. We examine the record in light of *Ciraolo.*[1]

Ciraolo reaffirms the standard of Fourth Amendment analysis set forth in *Katz v. United States* (1967) 389 U.S. 347:

> "The touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.' *Katz v. United States,* 389 US 347, 360 ... (1967) (Harlan, J., concurring). Katz posits a two-part inquiry: first, has the indivudual manifested a subjective expecta-

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[1]*People v. Cook, supra,* 41 Cal.3d 373, decided in December 1985, squarely holds a warrantless aerial survey leading to issuance of a search warrant under which marijuana plants growing in an enclosed backyard were seized violates article I, section 13 of the California Constitution, our state counterpart to the Fourth Amendment of the United States Constitution. *Cook* was not concerned with the effect of Proposition 8 on the excludability of evidence obtained in violation of article I, section 13, as the events at issue there predated June 8, 1982, the proposition's effective date. (*Id.*, fn. 1, p. 376.)

Here, the events occurred after the adoption of Proposition 8. Relevant evidence though unlawfully obtained under our Constition may be excluded only if exclusion is required by the United States Constitution. (*In re Lance W.* (1985) 37 Cal.3d 873, 890.) *Ciraolo* holds the Fourth Amendment does not require exclusion of evidence seized under a search warrant issued upon information acquired in a warrantless aerial naked-eye observation of the curtilage from a fixed wing aircraft flying at an altitude of 1,000 feet in navigable airspace. We are, of course, bound by *Ciraolo,* if applicable here. (See the dissent of Lucas, J. in *People v. Cook, supra,* 41 Cal.3d 373, fn. 1 at p. 386, noting *Cook* was a pre-Proposition 8 case and remarking the majority holding presumably will not affect aerial surveillance conducted after adoption of Proposition 8.)

> tion of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable? [Citation.]" (Ciraolo, *supra*, at p. 215.)

In *Ciraolo*, the Supreme Court found and the state did not challenge, the defendant clearly had manifested his subjective intent and desire to maintain privacy as to his "unlawful agricultural pursuits" (*id.* at p. 215). The high court noted:

> "It can reasonably be assumed that the 10-foot fence was placed to conceal the marijuana crop from at least street level views. So far as the normal sidewalk traffic was concerned, this fence served that purpose, because [defendant] 'took normal precautions to maintain his privacy.' [Citation.]" (*Ciraolo, supra,* at p. 215.)

Ciraolo then turns to the second inquiry, whether the expectation of privacy is reasonable. After concluding the yard in *Ciraolo* was part of the curtilage, the high court commented the Fourth Amendment has never been extended "to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares..." (*id.* at p. 216) and held:

> "The observations by Officers Shutz and Rodriquez in this case took place within public navigable airspace, see 49 USC App § 1304... in a physically nonintrusive manner; from this point they were able to observe plants readily discernable to the naked eye as marijuana. That the observation from aircraft was directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant. Such observation is precisely what a judicial officer needs to provide a basis for a warrant. Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. On this record, we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor." (*Ciraolo, supra,* at p. 217, fn. omitted.)

We examine the facts in our case.

B.

As in *Ciraolo,* the facts here satisfy the first *Katz* inquiry: the respondents had a subjective expectation of privacy in their greenhouse within the curtilage. We turn to the second, the reasonableness of their expectation of privacy.

In *Ciraolo,* the marijuana growing in the backyard was clearly visible to the naked eye peering from a fixed wing aircraft flying at a 1,000-foot altitude. While the fenced yard effectively shielded the marijuana from the view of the earthbound constable, as well as that of the casual passerby, the eye in the sky is not so inhibited.

> "In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet. The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye." (*Ciraolo, supra,* at p. 218, fn. omitted.)

Here, the marijuana was cultivated in a greenhouse partially screened by evergreens and from which some roof and side panels were missing. The officer circled the helicopter at an altitude of some 400 feet over the green house and saw, with unaided eye, through the gaps in the roof, the marijuana plants.

There are factual differences. *Ciraolo* has a fenced backyard open to the skies; marijuana easily visible to an observer from a

fixed wing aircraft flying at 1,000 feet in navigable airspace. Here, the greenhoused marijuana was visible only to an eye in a circling helicopter positioned such as to enable a peek at the pot through the gaps.

Respondents argue these factual differences demonstrate a reasonable expectation of privacy, contending *Dow Chemical Co. v. United States* (1986) 476 U.S. _____ [90 L.Ed.2d 226, 106 S.Ct. 1819] (hereafter *Dow*), decided the same date as *Ciraolo,* narrows the holding in that case in its application here. *Dow* considered a 2,000-acre, tightly secured chemical manufacturing complex including numerous covered buildings with manufacturing equipment and piping conduits exposed to aerial visual ovservation. Concluding the open areas of an industrial plant complex with numerous structures spread over an area of 2,000 acres was not analogous to the curtilage of a dwelling and more comparable to an open field, the court held the complex "is open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras." (*Dow, supra,* at p. 238.) the taking of aerial photographs of the complex from navigable airspace "is not a search prohibited by the Fourth Amendment." (*Ibid.*) *Ciraolo*'s narrow reading is said to be compelled by footnote 4 in the *Dow* opinion referring to the aerial observation of the 2,000-acre complex without physical entry:

> "We find it important that this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened. Nor is this an area where Dow has made any effort to protect against aerial dissent's understanding, post, at _____, 90 L Ed 2d _____, the Court of Appeals emphasized that 'Dow did not take *any* precautions against aerial intrusions, even though the plant was near an airport and within the pattern of planes landing and taking off. If elaborate and expensive measures for ground security show that Dow has an actual expectation of privacy in ground security, as Dow argues, then taking *no* measure for aerial security should say something about its actual privacy expectation in being free from aerial observation.' 749 F2d 307, 312 (CA6 1984) (emphasis added)." (*Dow, supra,* at p. 237.)

We find the suggestion the *Dow* footnote limits the broad sweep of *Ciraolo* not persuasive. First, the Supreme Court concluded in *Dow* the enclosed plant complex "does not fall precisely within the 'open fields' doctrine. The area at issue here can perhaps be seen as falling somewhere between 'open fields' and curtilage, but lacking some of the critical characteristics of both." (*Id.* at p. 236, fn. omitted.) The footnote reference to the area as not adjacent to a private house highlights the hybrid nature of the complex as "open field-curtilage." Second, the reference to Dow's failure to make any effort to protect against aerial surveillance necessarily relates to the open areas between the enclosed structures, again an elaboration on the hybrid theme. Finally, had the Supreme Court desired to limit the broad brush of *Ciraolo,* issued the same day as *Dow*, the canvas of that opinion was still wet and the artist was available to touch up the landscape.

While the naked-eye observation of marijuana growing in an open backyard from Ciraolo's fixed wing aircraft flying at 1,000 feet on a straight and narrow course in navigable airspace does not violate a reasonable expectation of privacy, respondents assert a helicopter hovering at 400 feet, positioned to peer through gaps in a roof, intrusively invades and impermissibly violates a reasonable expectation of privacy. *Ciraolo* emphasizes the aerial surveillance there considered occurred "from an aircraft lawfully operating at an altitude of 1,000 feet" (at p. 216). The Fourth Amendment does not require "law enforcement officers to shield their eyes when passing by a home on public thoroughfares" (*ibid.*) or "preclude an officer's observations from the public vantage point where he has a right to be" (*ibid.*). The officers' observations "took place within public navigable airspace" (*id.* at p. 217). Concerning the dissent's reference to Justice Harlan's concurrence in *Katz* [*v. United States, supra,* 389 U.S. 347], observing the Fourth Amendment should not be limited to a proscription only of

physical intrusions into private property, the majority in *Ciraolo* notes the potential for future electronic developments and interference with private communications "were plainly not aimed at simple visual observations from a public place" (*id.* at p. 217). The court's holding is plainly stated:[2]

> "The Fourth Amendment simply does not require the police traveling in the public airways at this altitude [1,000 feet] to obtain a warrant in order to observe what is visible to the naked eye" (*Ciraolo, supra,* at p. 218).

Dow, concluding the open area of the industrial plant complex with numerous plant structures over an area of 2,000 acres is comparable to an open field, holds that complex "is open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras" (*Dow, supra,* at p. 238) and "the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment" (*ibid.*)

Clearly, *Ciraolo* and *Dow* authenticate aerial surveillance taken within navigable airspace. There is a public right of freedom of transit through the navigable airspace of the United States. (49

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[2]Justice Powell's dissent, joined by Justices Brennan, Marshall and Blackmun, asserts the majority holding rests on the proposition in view from navigable airspace of the curtilage is not offensive to the Fourth Amendment: "Respondent contends that the police intruded on his constitutionally protected expectation of privacy when they conducted aerial surveillance of his home and photographed his backyard without first obtaining a warrant. The Court rejects that contention, holding that respondent's expectation of privacy in the curtilage of his home, although reasonable as to intrusions on the ground, was unreasonable as to surveillance from the navigable air space. In my view, the Court's holding rests on only one obvious fact, namely, that the air space generally is open to all persons for travel in airplanes. The Court does not explain why this single fact deprives citizens of their privacy interest in outdoor activities in an enclosed curtilage." (*Ciraolo, supra,* at p. 219.)

U.S.C. § 1304.) Navigable airspace is that airspace above the minimum altitudes of flight prescribed by regulations issued by the Civil Aeronautics Board. (49 U.S.C. § 1301(29).) The minimum altitude for a fixed wing aircraft over a congested area is 1,000 feet and 500 feet above the surface in an area other than a congested area. Over open water or in sparsely populated areas, an aircraft may not be operated closer than 500 feet to any person, vessel, vehicle or structure (14 C.F.R. § 91.79(b) & (c) (1986)).

Helicopters may be operated at less than the minimum applicable to aircraft if the operation is conducted "without hazard to persons or property on the surface" (14 C.F.R. § 91.79(d) (1986)).

As we have seen, *Ciraolo*'s fixed wing aircraft flight observation at 1,000 feet within the public navigable airspace is not intrusive of privacy. The validated photographs in *Dow* were taken from an aircraft flying at altitudes of 1,200, 3,000 and 12,000 feet, all within navigable airspace. (*Dow, supra,* at p. 232.) Public navigable airspace as to helicopters is not defined as a function of altitude. The regulations simply permit operation of helicopters at less than the minimum altitudes applicable to aircraft if the operation is conducted without hazard to earthbound persons or property (14 C.F.R. § 91.79(d) (1986)). While helicopters may be operated at less than minimum altitudes so long as no hazard results, it does not follow that such operation is conducted within navigable airspace.[3] The plain meaning of the statutes defining naviable airspace as that airspace above specified altitudes compels the conclusion helicopters operated below the minimum are not in navigable airspace. The helicopter hovering above the surface of the land in such fashion as not to constitute a hazard to persons or property is, however, lawfully operated. We next inquire whether such lawful operation equates with navigable airspace to authorize the aerial surveillance approved in *Ciraolo* and *Dow*.

---

[3]The courts have considered navigable airspace in the context of eminent domain. *United States v. Causby* (1946) 328 U.S. 256, declared federal statutes, together with administrative regulations, placed airspace above prescribed

We judically notice the unique capabilities of the helicopter to gambol in the sky — turning, curtsying, tipping, hummingbird-like suspended in space, ascending, descending and otherwise confounding its fixed wing brethern doomed to fly straight, turn in caution and glidingly descend. While a helicopter may be lawfully operated in the performance of its various capabilities, i.e., present no hazard to person or property, its usage as a platform for aerial surveillance conducted below minimum flight levels and not in navigable airspace, does not per se validate the search under the *Ciraolo-Dow* rationale — the view from the aircraft in navigable airspace is not an invasion of a reasonable expectation of privacy.

Those cases carefully posit the observation must be from navigable airspace. They do not address an aerial surveillance in airspace not dedicated to public use and in which the underlying property owner has interests sufficient to be subject to compensable taking.

We conclude *Ciraolo* does not declare a rule to govern aerial surveillance of the curtilage in all circumstances and at any altitude and from any platform. We come reluctantly to this conclusion because of the obvious difficulties it creates. Our reading of *Ciraolo* and *Dow* results in a mechanical application of the rule there announced — the naked-eye view from navigable airspace

minimum altitudes of flight in the public domain. Flights within the "immediate reaches" of the surface of a landowner's property and below the minimum prescribed altitude are not within the navigable airspace dedicated to public use and a compensable taking of an easement may result on a showing of an interference with actual use of the land (see *Pueblo of Sandia* ex rel. *Chaves v. Smith (1974) 497 F.2d 1043, 1045). The fact that flights occur within navigable airspace does not immunize the owner and operator of an airport for failure to designate the land and airspace necessary to provide an adequate approachway. (Aaron v. City of Los Angeles* (1974) 40 Cal.App.3d 471, 487.)

Flights of aircraft at altitudes below 100 feet, between 100 and 500 feet and over 500 feet in navigable airspace and at unspecified altitudes may result in a taking of property. (*Airport Operations or Flight of Aircraft as Constituting Taking or Damaging of Property,* 22 A.L.R.4th 863, §§ 5-8, pp. 876-901.)

does not offend the Fourth Amendment, whatever the circumstances of the view. We conceded that consideration of aerial surveillance by helicopter outside navigable airspace will again invoke myriad factual variations on the theme and require a case-by-case analysis to determine whether the surveillance offends Fourth Amendemnt precepts. Also, our conclusion creates a two-tiered concept. *Ciraolo-Dow* governs aerial surveillance conducted within and from navigable air space. Such surveillance outside navigable airspace continues to call for traditional inquiry into reasonable privacy expectation. This result is not in derogation of Proposition 8 requirements relevant evidence be admitted. Under *Ciraolo-Dow,* such evidence is limited to that acquired from a view had from navigable airspace. Those cases thus do not concern views outside that federal aerial enclave.

Finally, our conclusion recognizes the reality of helicopter aerial surveillance. To say any sighting from a helicopter in non-navigable airspace validates a search warrant sanctions a broad range of aerial acrobatics performed in lawful manner but admittedly intrusive, such as an interminable hovering, a persistent overfly, a treetop observation, all accompanied by the thrashing of the rotor, the clouds of dust, and earsplitting din. Views from navigable airspace are far removed from the situs observed. The lawfully operated helicopter need stand back only such distance as not to hazard persons or perperty. Surely, its subsequent antics are subject to the kind of scrutiny called for by *People v. Cook, supra,* 41 Cal.3d 373 at pp. 376-377.

On this record, we conclude the helicopter views from non-navigable airspace of the marijuana glimpsed through the missing panels of the greenhouse constituted an unreasonable invasion of respondents' expectation of privacy, and the seisure of the contraband under the warrant issued pursuant to the helicipter viewing violated respondents' Fourth Amendment rights.

Affirmed.

CERTIFIED FOR PUBLICATION.

BUTLER, J.

WE CONCUR:

WIENER, Acting P.J.

WORK, J.

APPENDIX B

California Supreme Court's Order
Denying Petition for Review

B-1

ORDER DENYING REVIEW

AFTER JUDGEMENT BY THE COURT OF APPEAL

4th District, Division 1, No. D002860

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE, Appellant,

v.

RONALD LEE SABO et al., Respondents.

Appellant's petition for review DENIED.

Bird

Chief Justice

APPENDIX C

Order of the United States District Court for Northern District of California Modifying Paragraph 3 of the Preliminary Injunction Prohibiting Aerial Surveillance by DEA Agents from Helicopter Below 500 Feet

C-1

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS (NORMAL) et al., Plaintiffs, vs. FRANCIS M. MULLEN, JR., et al., Defendants.	No. C-83-4037-RPA *ORDER MODIFYING PARAGRAPH 3 OF THE PRELIMINARY INJUNCTION*

In its Order of August 1, 1986, the Ninth Circuit generally sustained the preliminary injunction found at *NORML v. Mullen,* 608 F. Supp. 945, 965-66 (N.D. Cal. 1985), but remanded for reconsideration of paragraphs 3 and 4 of the injunction in light of the new United States Supreme Court decisions in *California v. Ciraolo,* 106 S. Ct. 1809 (1986). and the companion case *Dow Chemical Co. v. United States,* 106 S. Ct. 1819 (1986). This court asked for supplemental briefing, and further ordered the parties to confer regarding any possible stipulated modifications of the injunction and settlement of the case. The court has reviewed the supplemental memoranda, and is informed that the settlement conference with the United States Magistrate defined areas of dispute but did not result in settlement or any stipulated modification of the injunction. Good cause appearing therefor, the Court modifies the preliminary injunction as follows.

In *Ciraolo,* police officers investigating a tip flew over respondent's home in an airplane at an altitude of 1,000 feet. The officers readily identified marijuana plants growing in the yard, obtained a search warrant, and seized the plants. After the trial court denied respondent's motion to suppress, he pleaded guilty to a cultivation charge.

The Court found that respondent's expectation of privacy from *all* government observations of his backyard was unreasonable. That the illicit crop was within the "curtilage" of the home did not in itself bar all police observation. The pertinent inquiry was " 'whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.' " *Ciraolo* at 1812, quoting *Oliver v. United States*, 466 U.S. 170, 180-83 (1984). The Court concluded that the "Fourth Amendment simply does not require police traveling in the public airways at [1,000 feet] to obtain a warrant in order to observe what is visible to the naked eye." *Id.* at 1813.

Significantly, the Court took pains to note that the overflight was conducted "lawfully" and in "a physically nonintrusive manner," *Id.* at 1812, 1813, and to acknowledge the State's concession in *Dow Chemical* that "[a]erial observation of curtilage may become invasive, either due to *physical intrusiveness* or through modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens." *Id.* at 1814 n.3 (emphasis added).

The facts of *Ciraolo* and *Dow Chemical* are readily distinguishable from those of the case at bench. Plaintiffs here do not complain about single overflights of airplanes at 1,000 feet or higher, but of helicopters deliberately and repeatedly "hovering" over, "buzzing," and "dive bombing" their homes at altitudes as low as 50 to 100 feet. As detailed in the summaries of testimony at 608 F. Supp. 951-59, law-abiding class members have been embarrassed in very private moments by hovering craft, and have found helicopters landing on their property, or pursuing them when they were on foot, horseback, or in vehicles. Some plaintiffs appear to have suffered property damage as a result of these practices. The

witnesses described the tremendous noise, wind, and psychological impact caused by these low flights, and this Court found that CAMP's helicopter practices "at best disturb, and at worst terrorize, the hapless residents below." 608 F. Supp. at 957. As the Court noted,

> It is not just the highly disruptive character of low helicopter flights that distinguises them from the common airplane overflights that we are all accustomed to, but also the degree of their intrusiveness into "the privacies" of life; an airplane can see far less than a helicopter that is hovering outside a bedroom window or over an open outhouse or shower. This case demonstrates how the unique versatility of helicopters renders them at once an effective law enforcement tool and an unprecedented threat to civil liberties.

Id.

Finally, in contrast to the "routine" character of the Ciraolo and *Dow Chemical* flights that were "lawfully" conducted in navigable airspace, *Ciraolo* at 1813, *Dow Chemical* at 1822, this Court found that CAMP helicopter pilots regularly violated federal aviation regulations, and endangered the safety of those on the ground. 608 F. Supp. at 959. Indeed, defendants violations of these federal safety laws provided an independent ground for the relief granted, in addition to the constitutional grounds. *Id.* at 961 n.13.

In the Light of the substantial factual record developed in this case, the Court does not hesitate to find that "the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.' " *Ciralol* at 1812, quoting *Oliver v. United States,* 466 U.S. 170, 180-83 (1984). The altitude and route restrictions enumerated in the preliminary injunction are fully merited by both the fourth amendment and federal air safety standards. The restrictions may in fact be too lenient; even at 500 feet

helicopters can be raucous and unnerving to residents seeking privacy, peace and quiet in the shelter of their homes and curtilages.

To comport with the fourth amendment analysis of *Ciraolo* and *Dow Chemical,* the Court modifies paragraph 3 of the preliminary injunction to read as follows:

> 3. When conducting surveillance, helicopters shall comply with the provisions of 14 C.F.R. §§ 91.9 and 91.79(b) and (c), but in no case shall fly within 500 feet of any structure, person or vehicle Helicopters surveying in the vicinity of residential structures shall not fly within the hemisphere extending 500 feet from the outer circumference of the curtilage of any residence.

Paragraph 4 of the preliminary injunction remains unchanged.

IT IS SO ORDERED.

DATED: September 16, 1986

ROBERT P. AGUILAR
United States District Judge

CERTIFICATE OF SERVICE BY MAIL

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

RONALD LEE SABO and
ANGELA MARIE ZIZZO,

Respondent.

State of California)
) ss.
City and County of San Diego)

PETER C. LEHMAN, a member of the Bar of the Supreme Court of the United States, being duly sworn, deposes and states:

That his business address is 101 West Broadway in the City and County of San Diego, State of California, that on February 9, 1987, corrected copies of the attached Brief for Petitioner in the above-entitled matter were served on counsel of record by placing same in envelopes addressed as follows:

Clerk, United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Supreme Court of California
455 Golden Gate Avenue
San Francisco, CA 94102

Officer of Attorney General
110 West A St., Suite 700
San Diego, CA 92101

Robert Gusky, Esq.
12344 Oak Knoll Rd.
Suite C-1
Poway, CA 92064

Clerk of the Court
California Court of Appeal
Fourth Appellate District
Division One
1350 Front Street, Rm. 6010
San Diego, CA 92101

Clerk of Superior Court
for the Honorable William T. Low
220 West Broadway
San Diego, CA 92101

Christopher Blake, Esq.
2185 Sunset Cliffs Blvd.
San Diego, CA 92107

Said envelopes were then sealed and deposited in the United States mail at San Diego, California with first class postage thereon fully prepaid.

PETER C. LEHMAN
Deputy District Attorney

Subscribed and sworn to before me
this 9th day of February, 1987

NOTARY PUBLIC IN AND FOR THE CITY
AND COUNTY OF SAN DIEGO, CALIFORNIA

OFFICIAL SEAL
SHIRLEY B. GORDON
NOTARY PUBLIC - CALIFORNIA
SAN DIEGO COUNTY
My Comm. Expires Sept. 15, 1989

CERTIFICATE OF SERVICE BY MAIL

THE PEOPLE OF THE STATE OF CALIFORNIA Petitioner, v. RONALD LEE SABO and ANGELA MARIE ZIZZO, Respondent.	)

State of California)
) ss.
City and County of San Diego)

LES W. DUBOW, a member of the Bar of the Supreme Court of the United States, being duly sworn, deposes and states:

That his business address is 101 West Broadway in the City and County of San Diego, State of California, that on January 23, 1987 true copies of the attached Brief for Petitioner in the above-entitled matter were served on counsel of record by placing same in envelopes addressed as follows:

Clerk, United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Supreme Court of California
455 Golden Gate Avenue
San Francisco CA 94102

Office of the Attorney General
110 West A Street, Suite 700
San Diego, CA 92101

Christopher Blake, Esq.
2185 Sunset Cliffs Blvd.
San Diego, CA 92107

Clerk of the Court
California Court of Appeal
Fourth Appellate District
Division One
1350 Front Street Room 6010

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for the Honorable
William T. Low
220 West Broadway
San Diego, CA 92101

Robert Gusky, Esq.
12344 Oak Knoll Rd.
Suite C-1
Poway, CA 92064

Said envelopes were then sealed and deposited in the United States mail at San Diego, California with first class postage thereon fully prepaid.

LES W. DUBOW
Deputy District Attorney

Subscribed and sworn to before
me this 23d day of January, 1987

OFFICIAL SEAL
SHIRLEY B. GORDON
NOTARY PUBLIC - CALIFORNIA
SAN DIEGO COUNTY
My Comm. Expires Sept. 1, 1990

NOTARY PUBLIC IN AND FOR THE CITY
AND COUNTY OF SAN DIEGO, CALIFORNIA

OPPOSITION

BRIEF

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

No. 86-1289

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

RONALD LEE SABO and ANGELA MARIE ZIZZO,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

APPELLATE DEFENDERS, INC.

Howard Charles Cohen
Christopher Blake
Robert Gusky
Attorneys at Law
233 A Street, Suite 1310
San Diego, CA 92101
(619)696-0282

Attorneys for Respondents
Ronald Lee Sabo and
Angela Marie Zizzo

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TABLE OF AUTHORITIES

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No. 86-1289

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, RONALD LEE SABO and ANGELA MARIE ZIZZO, respectfully request that this Court deny the State of California's petition for a writ of certiorari seeking review of the published opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One and submit the following as their Brief in Opposition.

INTRODUCTION

Petitioner, the People of the State of California seek a writ of certiorari in this court to overturn a decision of the Court of Appeal of the State of California, Fourth Appellate District, Division One, declaring an aerial surveillance undertaken by petitioner of respondents'

backyard and the structures contained therein to be in violation of respondents' Fourth Amendment rights against unreasonable searches and seizures.

STATEMENT OF THE CASE

Respondents concur with the petitioner's presentation of the Statement of the Case appearing at pages 1 through 4 of the petition for writ of certiorari.

STATEMENT OF FACTS

The following statement of facts is taken from the transcripts of the preliminary hearing, the motion to suppress evidence and the search warrant in support of the affidavit, all of which were made part of the record on appeal in the Court of Appeal of the State of California, Fourth Appellate District, Division One.

On August 28, 1984, Deputy Larry Martin of the San Diego County Sheriff's Narcotics Squad was contacted by Deputy Dave Wilson, a pilot for the Sheriff's ASTREA helicopter unit, who informed him that, while on "routine" patrol, he had spotted four or five suspected marijuana patches.[1] The precise purpose of Wilson's "routine" patrol was never made clear in the record.

Martin then asked him to fly him over these suspected patches. One of them turned out to be located at 7974 El Capitan Drive in La Mesa, a thickly populated suburb of San Diego, California. From a distance of 400 to 500 feet over the property, Martin observed a greenhouse that apparently had several panels missing from the roof. Martin stated that he was able to identify a number of marijuana plants, at least six feet high, through these missing panels.

Martin conceded that there was a great deal of

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[1] ASTREA is the helicopter unit of the San Diego County Sheriff's Department and is used for rescue operations, traffic patrol and other law enforcement matters.

shrubbery surrounding the greenhouse including several pine trees that partially blocked his view. However, after ordering Wilson to circle the residence, he stated he was able to obtain a view of the contents of the greenhouse but only from one specific angle. Martin further admitted that the only reason he suspected that the greenhouse contained marijuana plants was because they were a different color from the surrounding vegetation. Furthermore, he did not use binoculars or other visual enhancement equipment to aid in his identification.

Martin then obtained a search warrant which was executed at 5:30 p.m. the next day. Both respondents Sabo and Zizzo were present. The search of the residence turned up a quantity of heroin, including some located in Ms. Zizzo's purse, and some 66 mature marijuana plants weighing a total of 175 pounds in the greenhouse. In addition, a number of seeds from various species of marijuana were also found. Martin opined that, based upon the amounts found at the scene, it was likely that these drugs were held for purposes of sale rather than personal use.

REASONS WHY THE WRIT OF CERTIORARI
SHOULD NOT BE GRANTED IN THIS CASE.

Petitioner, the State of California, contends that this court should grant a writ of certiorari in this matter because it claims that this court has "determined that observations by law enforcement from a place they have a lawful right to be in does not offend fundamental notions inherent in the evolution of the Fourth Amendment." (Petition for Writ, p. 6). Petitioner claims that the decision of the Court of Appeal is in contravention to the recent decisions of this court in California v. Ciraolo (1986) 476 U.S. _____, 106 S.Ct. 1809, and Dow Chemical v. United States (1984) 476 U.S. _____, 106 S.Ct. 1819. To the contrary, this court has never given blanket approval to all aerial surveillance regardless of the height from which they are made. The Court of Appeal of the State of California properly determined that the observations made by law enforcement personnel in this case were made from an impermissible vantage point.

Petitioner somehow suggests that the decision of the Court of Appeal creates a double standard in that helicopters may be lawfully used at low altitudes to perform rescue operations but not to search out marijuana growing inside a greenhouse. Petitioner ignores the obvious--saving flood victims or lost children are life-and-death situations but seeking out marijuana plants inside a greenhouse is not. The two are not equivalent and this court

has long recognized the difference between emergency situations and non-emergency situations in the context of the Fourth Amendment.[2]

Petitioner also claims that the law is unclear, especially in California, as to the right of law enforcement to use aerial surveillance in drug cases. Petitioner cites an order of the Northern District of California prohibiting Drug Enforcement Agency agents from undertaking aerial helicopter surveillance from an altitude of less than 500 feet. That order actually supports a decision of this court to deny certiorari as that order and the decision of the Court of Appeal in this case are reasonably compatible as the surveillance in this case was from an altitude of less than 500 feet.

The decision of the Court of Appeal of the State of California adequately defines the proper limitations of helicopter aerial surveillance and this court should therefore deny the writ of certiorari.

---

[2] Under certain circumstances, police may search premises under "exigent circumstances" where evidence is about to be destroyed (Cupp v. Murphy (1973) 412 U.S. 291) or to search for additional suspects (People v. Block (1971) 6 Cal. 3d 239) or to protect lives or property (People v. Hill (1974) 12 Cal. 3d 731, but note that a call for help is not an invitation to the general public to invade the privacy of the home (Thompson v. Louisiana (1984) _____ U.S. _____, 105 S.Ct. 409). At no time, has the State of California ever contended that exigent circumstances existed in this case.

ARGUMENT

I.

RESPONDENTS HAD A REASONABLE EXPECTATION OF PRIVACY REGARDING THE CONTENTS OF THE GREENHOUSE IN THE BACKYARD OF THEIR SURBURBAN RESIDENCE WITHIN THE MEANING OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Petitioner correctly concedes that respondents' arguments were persuasive that they had a subjective expectation of privacy for the activities undertaken in their greenhouse; petitioner incorrectly argues that the expectation was not "reasonable." (Petition for writ, p. 7).

Petitioner then cites a number of cases which simply are not applicable to the case at bar. People v. Superior Court [Stroud], (1974), 37 Cal. App. 3d 836, is distinguishable on three counts; first, the contraband article, an automobile hood, was conspicuous and readily identifiable; second, the helicopter patrol was regarded as routine by the court; and, third, the helicopter never hovered. (Id. at 838-839) In the instant case, first, it is undisputed that respondents took all reasonable precautions possible to shield the contents of the greenhouse from routine aerial surveillance. Second, the Sheriff's helicopter had to return to the respondents' residence and circle their property several times and could only view the contents from one specific angle. Third, the helicopter hovered over the respondents' property to gain the specific angle necessary to view the contents of the greenhouse. This is a

far cry from the situation in Stroud.

People v. Messervy (1985) 175 Cal. App. 3d 243, People v. Joubert (1981) 118 Cal. App. 3d 637, and Dean v. Superior Court (1973) 35 Cal. App. 3d 112, all involved aerial surveillance of open fields, that is, areas outside the curtilage of the home. Here, the petitioner has always conceded that the respondents' greenhouse was within the curtilage of their home.

Petitioner claims that the line drawn by the Court of Appeal in the instant case does not comply with the "bright line" rules governing surveillance under the Fourth Amendment of the United States Constitution. To the contrary, the decision of the Court of Appeal provides a sound and workable bright line that law enforcement can readily understand (see Argument III).

The Court of Appeal concluded that surveillance of the curtilage from within navigable airspace as that term is defined in the law is permissible; surveillance outside navigable airspace is not. (People v. Sabo (1986) 185 Cal. App. 3d 845).

II.

THE CONCEPT OF "NAVIGABLE AIRSPACE" PROVIDES A SOUND BASIS FOR DETERMINING WHEN AERIAL SURVEILLANCE OF THE CURTILAGE OF A SUBUREAN RESIDENCE BY A HELICOPTER VIOLATES THE FOURTH AMENDMENT.

Petitioner argues that, as long as the helicopter is being operated safely, it is in navigable airspace as defined by 14 Code of Federal Regulations, section 91.79, which provides, in pertinent part, as follows:

> "Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes...
>
> (b) Over congested areas. Over any congested area of a city, town or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.
>
> (c) Over other than congested areas. An altitude of 500 feet above the surface except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.
>
> (d) Helicopters. Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) if the operation is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with routes or altitudes specifically prescribed for helicopters by the administrator."

Petitioner's argument is faulty. Rather, the opinion of the Court of Appeal is correct in asserting that "navigable airspace" and "lawful flight" are not synomous. This correct conclusion flows from the interaction of federal statutes and regulations.

First, "navigable airspace" is defined in 49 United States Code section 1301(29) as "airspace above the minimum altitudes of flight prescribed by regulations issues under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft." (Emphasis added.) Second, "aircraft," as defined in Section 1301(5), includes helicopters. Third, the general minimum safe altitudes allowed for aircraft--excepting for takeoff and landing--is 1000 feet over congested areas and 500 feet over other than congested areas. 14 Code of Federal Regulations section 91.79(b),(c). Fourth, helicopters may be operated at less than the generally safe minimum altitudes if the operation is conducted without hazard to persons or property on the surface. 14 Code of Federal Regulations 91.79(d).

What appropriate conclusions can be drawn from the statute and regulations? First, Petitioner's contention that the opinion of the Court of Appeal prohibits observations during take-offs and landings (Petition, p. 11) is unfounded. The language quoted above unequivocally includes the space necessary for take-off and landing within navigable airspace and excepts such space from the minimum safe altitudes.

(Moreover, the present language defining "navigable airspace" specifically amended the language of its predecessor to include take-off and landing. U.S. Code Congressional and Administrative News, 1958, Vol. 2, p. 3751.) An observation made during routine take-off and landing is not prohibited and nothing in the opinion of the Court of Appeal implies any such prohibition.

Second, the legislative history[3] of the pertinent statutes and regulations leads to the conclusion that special hovering and tactics by a helicopter below 1000 feet in a congested area, while permissible in exigent circumstances, is not within navigable airspace. The predecessor to the

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[3] The legislative history of "navigable airspace" and "minimum safe altitudes" began with the Air Commerce Act of 1926, section 10 (Act of May 20, 1926, c. 344, 44 Stat. 568, which, as today, basically defined "navigable airspace" in terms of "minimum safe altitudes of flight" as prescribed by federal regulations. The Air Commerce Regulations, 1928, thereafter followed. Specifically, Sec. 74(H) first prescribed the congested, 1000 feet and noncongested, 500 feet heights. See 1928 U.S. Aviation Reports 405-406.

Eventually, Congress enacted the Civil Aeronautics Act of 1938 (Act of June 23, 1938, c. 601, 52 Stat. 973) which, in section 1(24) again defined navigable airspace in terms of minimum safe altitudes. Congress, in all probability, had in mind the 1000'-500' dichotomy most recently promulgated in 14 Code of Federal Regulations § 60.35 (1938) which contained more detail than the Air Commerce Regulations, 1928, but still left helicopters unmentioned.

By August 1, 1949, provisions relating to helicopters had been instituted. 14 Code of Federal Regulations § 60.17 (1949).

The current current statutory definition of navigable airspace emanates from the Federal Aviation Act of 1958, Public Law 85-726, 72 Stat. 731, sec. 101(24).

current 14 Code of Federal Regulations section 92.79(d) was 14 Code of Federal Regulations section 60.17(b) (1949) which permitted helicopter flight below 1000 feet if conducted without hazard. The Note to the subsection is particularly illuminating:

> The rule recognizes the special flight characteristics of the helicopter which can accomplish an emergency landing within a relatively small space. However, if a helicopter is flown over [a] congested area . . . at less than 1,000 feet above the highest obstacle, the pilot is required to fly with due regard to places in which an emergency landing can be made with safety, and further, to maintain an altitude <u>along the flight path</u> thus selected from which such an emergency landing can be effected at any time.

(Emphasis added.)

With the foregoing in mind, respondents contend that the legislative definition of navigable airspace for <u>all aircraft</u> is generally 1000 feet above congested areas, although helicopters may be operated below the 1000 foot floor when safe. In the alternative, respondents submit that even if the navigable airspace for a helicopter may be

construed to include airspace below the 1000 foot floor, nevertheless, the concept of "navigable airspace" permitting a flight path from which an emergency landing may be made ceases to exist when a helicopter is maneuvered to a particular place, in a hover, to achieve a specific angle of sight toward the the respondents' or anyone else's property. Should power fail to a helicopter in a hover, there is no remedy to an immediate fall, nor to the potential tragic consequences if such occurs but a few hundred feet over a congested, residential neighborhood.

Further, respondents assert that, except for truly exigent circumstances,[4] maneuvering a helicopter into a hover over a congested, residential neighborhood, to confirm or dispel a suspicion of maijuana growth in a residential, backyard greenhouse, does not comport with an altitude along a flight path conducive to an emergency landing. Hence, the flight altitude and attitude of the helicopter in the instant case can be said to have been an unlawful operation. Hence, Texas v. Brown (1983) 460 U.S. 730, has no proper application here.

Additionally, as the Court of Appeal noted, helicopters are extraordinarily intrusive:

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4. While one may question the diligence of a pilot or rescuers engaged in very low altitude life-saving efforts shoud they divert their attention elsewhere, nevertheless, should an observation be made of contraband during a rescue attempt, perhaps the evidence would not be suppressed. Of course, that is not the instant circumstance.

> "Finally, our conclusion recognizes the reality of helicopter aerial surveillance. To say any sighting from a helicopter in non-navigable airspace validates a search warrant sanctions a broad range of aerial acrobatics performed in lawful manner but admittedly intrusive, such as an interminable hovering, a persistent overfly, a treetop observation, all accompanied by the thrashing of the rotor, the clouds of dust, and earsplitting din. Views from navigable airspace are far removed from the situs observed." (People v. Sabo, supra, at 854-855)

In NORML v. Mullen (N.D. Cal. 1985) 608 F. Supp. 945, the Court had the following comments concerning the intrusive nature of helicopter surveillance:

> "It is not just the highly disruptive character of low helicopter flights that distinguishes them from the common airplane overflights that we are all accustomed to, but also the degree of their intrusiveness into 'the privacies' of life; an airplane can see far less than a helicopter that is hovering outside a bedroom window or over an open outhouse or shower. This case demonstrates how the unique versatility of helicopters renders them at once an effective law enforcement tool and an unprecedented threat to civil liberties." (Id. at 957)

The Mullen court recognized, as did the Court of Appeal, that some limitations on aerial surveillance by helicopters were necessary beyond the bare limitations of

safety imposed by Section 91.79. The Mullen court proposed a ceiling of 500 feet. The Court of Appeal in this case adhered to the definition of navigable airspace. The latter definition is appropriate and correct and this court need not grant certiorari to resolve this issue.[5]

The importance of the concept of navigable airspace to the lawfulness of aerial surveillance is underscored by Ciraolo itself. As the majority opinion concludes:

> "In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet. The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye. (Id. at 1813, emphasis added).

Dow Chemical v. United States, supra, expresses similar sentiments in upholding the aerial surveillance of an industrial plant from within navigable airspace:

> "We hold that the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment." (Id. at 1827).

Thus, it is abundantly clear that the Court of Appeal was correct in adopting the standard of navigable airspace to determine the legitimacy of aerial surveillance of the curtilage of a residence. Any lesser standard would result in an obtrusive and illegal invasion of the residence.[6]

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[5] It is of interest to note that section 91.79(d) does not alter the definition of navigable airspace for helicopters; it merely allows them to operate in non-navigable airspace if it is safe. The mere fact that it may be "safe" to operate a helicopter at low levels does not mean that they are immune to the breadth of the Fourth Amendment absent some emergency or exigent circumstance.

[6] In this regard it must be stressed that, unlike the situation in Ciraolo, the marijuana in this case was not growing out in the open, but, rather, inside a greenhouse in a suburban residential backyard surrounded by dense shrubbery and was only visible from one specific angle. Had petitioners made their observations from navigable air space it is highly unlikely that they would have spotted the marijuana. Respondents clearly had taken adequate and reasonable steps to shield their activities from routine aerial surveillance conducted within navigable airspace. Neither the defendant in Ciraolo nor the petitioners in Dow Chemical undertook any steps to conceal their activities from routine aerial surveillance undertaken within navigable airspace. As developed in the opinion of the Court of Appeal, these distinctions are crucial.

III.

THE GUIDELINES OF THE COURT OF APPEAL PROVIDE AN APPROPRIATE MANNER FOR DISTINGUISHING BETWEEN AERIAL SURVEILLANCE OF OPEN FIELDS BY FIXED WING AIRCRAFT AS OPPOSED TO AERIAL SURVEILLANCE OF THE CURTILAGE OF A SUBURBAN RESIDENCE BY A HELICOPTER.

Petitioner contends that the decision below "departs from the pronouncement of Fourth Amendment doctrine by creating on the part of law enforcement a guessing game as to which law enforcement activity will be sanctioned in state court." Petition, p. 10. This is undue and alarmist speculation.

Law enforcement agents need not guess. If police in a helicopter cruise at least 1000 feet above the highest nearby obstacle or are taking off or landing, the police are in navigable airspace, and their observations are admissible. If, in a truly exigent circumstance, where they may lawfully be below the 1000 foot floor, again their observations would be admissible. When, however, they must in circumstances sans exigency, circle and maneuver, and then hover to gain a specific angle of sight, with little or no regard for the need for an emergency landing, over a populated suburb, the observations should be inadmissible.

Petitioner's arguments also conveniently ignore the fact that the surveillance was of the curtilage of the respondents' home. Indeed, the petitioner agreed in the Court of Appeal that respondents' greenhouse was within the

curtilage of their residence. This court has long noted that the curtilage is entitled to greater protection than open fields. (Hester v. United States (1924) 265 U.S. 57; Oliver v. United States (1984) 466 U.S. 170, 104 S.Ct. 1735) As stated in Oliver:

> "In this light, the rule of Hester v. United States, supra, that we reaffirm today, may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in field, except in the area immediately surrounding the home...
>
> "The distinction [between open fields and the curtilage] implies that only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protection that attach to the home." (Id. at 1741, 1742, emphasis added).

This court continues to recognize the distinction between curtilage and open fields. As recently as March, 1987, this court recognized that individuals are entitled to a greater expectation of privacy within the curtilage of their residence. (United States v. Dunn (1987)_____ U.S.___ ,55 L.W. 4251, 4252).

If petitioner's position is adopted by this Court, it will necessitate a repeal of the doctrine of curtilage, a doctrine dating from the earliest times of the common law. As stated in Ciraolo:

> "The history and genesis of the curtilage doctrine is

> instructive. 'At common law, the curtilage is the area to which extends the intimate activity associated with the "sanctity of a man's home and the privacies of life."' Oliver, supra, 466 U.S. at 180, 104 S.Ct. at 1742 (quoting Boyd v. United States (1886) 116 U.S. 616...See 4 Blackstone, Commentaries *225. The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." (Id. at 1812).

It is undisputed that a search from the ground by the petitioner under the facts of this case would not comport with the constitutions of the State of California and the United States. Petitioner's argument that the search by a helicopter simply lifts the police above the law, either because of a supposed "safe" vantage point from a helicopter hovering below navigable airspace or because it was contraband they were looking for. The Constitution is thereby tethered to the earth, or, perhaps, like Antaeus, it loses all of its strength off the ground.

The aerial surveillance of the curtilage of a residence, the sanctity of a home, from altitudes well below navigable airspace is an intolerable imposition upon our liberty and privacy. It is a sure and certain path to totalitarian control, however "benevolent" the motives of its current proponents. The opinion of the Court of Appeal sets

forth a sound rule to protect the citizens of this country from highly intrusive aerial searches of the curtilage of their residences. This court should therefore deny the petition for a writ of certiorari.

IV.

CONCLUSION.

The opinion of the Court of Appeal is a correct decision applying principles of the California and United States Constitution and adequately sets forth the law in this area.

The Court of Appeal's opinion properly strikes a fine balance between the proper use of new technology and the traditional rights of the citizens to privacy in their homes.

This Court should therefore deny the petitioner's request for a writ of certiorari.

Dated: April 13, 1987.

Howard Charles Cohen
Christopher Blake
Robert Gusky
Attorneys at Law
233 A Street, Suite 1310
San Diego, CA 92101
(619) 696-0282

Attorneys for Respondents
Ronald Lee Sabo and
Angela Marie Zizzo

OPINION

SUPREME COURT OF THE UNITED STATES

CALIFORNIA *v.* RONALD LEE SABO AND ANGELA MARIE ZIZZO

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

No. 86-1289. Decided May 18, 1987

The motion of respondent Ronald Lee Sabo for leave to proceed *in forma pauperis* is granted. The motion of respondent Angela Marie Zizzo for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

During a routine helicopter patrol a deputy sheriff observed what he believed to be marijuana plants growing inside a 15 by 20 foot greenhouse located in respondents' back yard. The helicopter hovered at 400 to 500 feet and circled the greenhouse in order to give the deputy a better look at the marijuana. Based on this observation a search warrant issued and deputies seized the marijuana. A trial court held the marijuana inadmissible as evidence and the California Court of Appeals affirmed, holding that the deputy's observation of the greenhouse from the hovering helicopter violated the Fourth Amendment. *People* v. *Sabo*, 185 Cal. App. 3d 845 (1986). The Court of Appeals distinguished *California* v. *Ciraolo*, 476 U. S. —— (1986), on the ground that there the observation of marijuana was made from a fixed-wing aircraft flying in navigable airspace at an altitude over 1,000 feet. The court concluded that here the helicopter was not in navigable airspace as that term is defined at 49 U. S. C. § 1301(29), but recognized that the helicopter was lawfully positioned because federal regulations allow operation of helicopters at altitudes less than the minimum permitted to

fixed-wing aircraft, provided that the helicopter operates without hazard to persons or property, see 14 CFR § 91.79(d) (1986).* The court expressed concern about the capabilities of helicopters to furnish "a platform for aerial surveillance," *id.*, at ——, and held that the search in this case infringed on a reasonable expectation of privacy.

The Court of Appeals' holding that the helicopter was not in navigable airspace is questionable, and even if this is technically correct it remains true, as the court conceded, that the helicopter was lawfully positioned when the deputy observed the marijuana in respondents' greenhouse. While it is certainly possible that helicopter surveillance could be unreasonably intrusive on account of interminable hovering, raising clouds of dust, creating unreasonable noise, and so forth, nothing in the record indicates that any such factor was present in this case. The decision below is a highly questionable interpretation of our decision in *California* v. *Ciraolo*. I would grant certiorari.

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*Title 49 U. S. C. § 1301(29) defines navigable airspace as "airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, . . . includ[ing] airspace needed to insure safety in take-off and landing of aircraft." The Court of Appeals reasoned that a helicopter flying below 1000 feet is not above a specified minimum flight altitude and hence not in navigable airspace.